IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0552

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TYSON LEE HAPPEL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County,
The Honorable Gregory R. Todd, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion in deciding, based on the Defendant/Appellant's motion and the record in the case, that his complaint about his attorney's performance was not "seemingly substantial?"

2. If the district court did abuse its discretion, was the error harmless under the circumstances of this case?

STATEMENT OF THE CASE

Defendant/Appellant Tyson Lee Happel (Happel) pled guilty pursuant to a plea agreement to one count of felony criminal endangerment and one count of felony theft on March 5, 2009. (D.C. Docs. 13, 14, 15 (attached as Appendix A); 3/5/09 Tr. (attached as Appendix B).)

On April 28, 2009, Happel sent a *pro se* document to the prosecutor entitled "Defendant's Combined Motions to Withdraw Guilty Plea, and to Remove Counsel of Record, With Effective Appointment." (D.C. Doc. 17 (attached as Appendix C).)[1] The State opposed the motions. (Appellant's App. 1 at 2-4; D.C. Doc. 18 (attached as Appendix D).) The motions were denied. (Appellant's App. 2 at 2; D.C. Doc. 19.)

[1] If Happel "has learning disabilities and difficulty expressing his thoughts" (Appellant's Br. at 1), that is not apparent from his *pro se* motion, which is articulate and precise, although without merit.

Happel was then sentenced in accordance with the plea agreement to two concurrent sentences of ten years at the Montana State Prison, with three suspended. (App. A at 2, ¶ 5; Appellant's App. 3 at 1.) Happel also asked for a recommendation for placement at the Treasure State Correctional Training Center (boot camp), as the plea agreement allowed, and the district court granted his request. (App. A at 2, ¶ 5; Appellant's App. 3 at 2.)

He appeals his guilty plea, arguing that he should have been appointed new counsel in order to file a motion to withdraw it. (D.C. Doc. 26; Appellant's Br. at 10.)

STATEMENT OF FACTS

On December 30, 2008, Happel stabbed the victim, J.O., and cut him numerous times on his torso during a fight outside a bar in Billings. (D.C. Doc. 1 at 2; see also App. A at 2.) The fight began when Happel's drinking companion became confrontational and was escorted out of the bar. (Id.) The companion continued to fight with the bar's bouncer, and J.O. came to the bouncer's aid. (Id.) Happel attacked J.O., stabbing and cutting him. (Id.)

Happel then fled the scene in a black pickup truck that had been stolen from the home of its owner three days earlier. (D.C. Doc. 1 at 2-3; see also App. A at 2.) The owner had parked the vehicle outside his home with the keys inside when

his son's wife heard the vehicle start and saw it being driven away. (D.C. Doc. 1 at 3.) The owner immediately reported it stolen. (Id.)

Police located the truck in a shopping mall parking lot shortly after the fight described above and saw a man matching Happel's description get out of the vehicle and begin walking toward the mall. (Id.) When he observed the presence of police officers, he began walking between parked vehicles in the lot. (Id.) A jacket matching the description of the jacket Happel had been wearing during the fight was found in the vehicle. (Id.) When Happel was apprehended, he blurted out: "Isn't it misdemeanor joyriding since the keys were in the truck?" (Id.)

Two charges of tampering with evidence were dropped in the plea negotiations. (D.C. Doc. 3; App. A .) Police investigators determined that Happel had disposed of the knife or other weapon that had been used to harm J.O. by giving it to another woman at the bar before he left the scene. (D.C. Doc. 1 at 2.) Furthermore, when police located Happel getting out of the pickup truck in which he had fled, Happel, observing police in the parking lot, threw the keys to the stolen truck underneath a parked car as he walked by it. (Id. at 3.)

Facts concerning procedural matters will be included in the Argument below.

STANDARD OF REVIEW

The substitution of appointed counsel is within a trial court's sound discretion. This Court will not overturn a trial court's decision on a request for the appointment of new counsel absent an abuse of discretion. State v. Rose, 2009 MT 4, ¶ 95, 348 Mont. 291, 202 P.3d 749. The "abuse of discretion" standard of review is applied to the procedural aspects of the trial court's decision, as well as the substantive decision itself. See, e.g., State v. Gazda, 2003 MT 350, ¶ 33, 318 Mont. 516, 82 P.3d 20 (applying the "abuse of discretion" standard to a trial court's decision not to appoint separate counsel for the initial inquiry into the defendant's request for substitution of counsel).

SUMMARY OF THE ARGUMENT

The basic rule established by State v. Enright, 233 Mont. 225, 229, 758 P.2d 779, 782 (1988), is this: "Upon a showing of a seemingly substantial complaint about counsel, the District Court should conduct a hearing to determine the validity of the defendant's claims." Here, the district court did not abuse its discretion in deciding, based on Happel's motions and the record, that there was no showing of a "seemingly substantial complaint." A district court should be required to hold a formal "inquiry" only if the complaints and the record do not give the court "a

sufficient basis for reaching an informed decision." See United States v. Smith, 282 F.3d 758, 765 (9th Cir. 2002).

Assuming for the sake of argument only that a formal "inquiry" should have been held and that Happel's attorney should have been replaced, Happel still would not have had grounds to withdraw his guilty plea. Happel admitted the basic facts of his offenses; the plea agreement and colloquy established that he understood the consequences of his plea and acted voluntarily; and, in the end, Happel received exactly the sentence that he bargained for. If there was error, it was harmless.

ARGUMENT

I. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT DECIDED, BASED ON HAPPEL'S MOTION AND THE RECORD IN THIS CASE, THAT HAPPEL DID NOT PRESENT A "SEEMINGLY SUBSTANTIAL COMPLAINT" ABOUT THE ASSISTANCE OF HIS COUNSEL.

A. Background

1. Preparation for Trial and Plea Agreement

Happel's attorney throughout the proceedings below appeared with Happel at his arraignment on January 5, 2009. (D.C. Doc. 2.) Happel pled not guilty to four felony counts: Assault With a Weapon, Theft, and two counts of Tampering With Evidence. (D.C. Doc. 3.) Happel's attorney made a bond recommendation on his behalf, and bond was set at $50,000. (Id.) On January 9, 2009, Happel's

attorney filed a Discovery Demand and Motion (D.C. Doc. 6), which was granted. (D.C. Doc. 9.) Happel was released on bail on January 12, 2009. (D.C. Doc. 7.)

On February 10, 2009, Happel's attorney filed a Notice of Intention to Interpose Defense of Justifiable Use of Force. (D.C. Doc. 10.) On March 4, 2009, she filed a Notice of Affirmative Defense of Third Person. (D.C. Doc. 11.) The next day, the State entered into a plea agreement with Happel. (App. A.) In return for the State's dropping the two tampering charges and amending the assault with a weapon charge to criminal endangerment, Happel agreed to plead guilty. (App. A at 1.) The plea agreement provided for a joint recommendation of concurrent sentences of ten years, with three suspended, as a persistent felony offender, and a $2,000 fine. (App. A at 2.) Happel could argue for a Boot Camp designation. (Id.) The sentencing agreement was not binding on the district court. (Id.)

The Acknowledgment of Waiver of Rights and Plea Agreement was signed by Happel and initialed by Happel on each page. (App. A.) The document stated at the outset: "This plea is being voluntarily made and not the result of force, threat, or coercion. I acknowledge that my attorney has explained to me and advised me of the following and I fully understand the following . . . ." (App. A at 1.)

The signed document continued, stating in the section on "Offense/Penalty/Lesser Included Offenses":

> The State has filed Intent to have Defendant Designated a Persistent Felony Offender, pursuant to 46-18-502(1) MCA, Defendant could be sentenced to a term of not less than 5 years and not more 100 years together with a fine of $50,000; and not less than 10 years and not more 100 years together with a fine of $50,000 pursuant to 46-18-502(2) MCA.

(App. A at 1.) Furthermore, in the section on "Plea Agreement/Sentence Recommendation," the signed document stated:

> There is a 1(c) plea agreement in this case. The State and Defendant will jointly recommend a sentence of:
>
> **Count I: Criminal Endangerment: Ten (10) years to Montana State Prison with Three (3) suspended, as Persistent Felony Offender, $2000 fine, and reasonable restitution**
> **Count II: Theft (Felony): Ten (10) years to Montana State Prison with Three (3) suspended, as Persistent Felony Offender, $2000 fine, concurrent with count I**
>
> **Defendant may argue for a Boot Camp designation from the Court.**
>
> I further understand that if the plea is rejected by the Court that I will not be entitled to withdraw my plea of Guilty as a matter of law.

(App. A at 2 (emphasis in original).)

Finally, the signed document stated: "I am satisfied with my attorney's services and advice, and I have had adequate time to prepare a defense. I have received a copy of all of the discovery and investigative reports in this case, and have reviewed those with my attorney." (App. A at 3.)

At the change of plea hearing that day, the district court again reviewed orally the information that was in the document that Happel signed. (App. B.) The colloquy included the following:

> THE COURT: I've been provided with an Acknowledgment of Waiver of Rights and a Plea Agreement, did you sign that document?
>
> MR. HAPPEL: Yes, ma'am.
>
> THE COURT: Did you have an opportunity to go through the document with [defense counsel]?
>
> MR. HAPPEL: Yes.
>
> . . . .
>
> THE COURT: Do you understand that the State has filed a notice to pursue you as a persistent felony offender which would make the maximum possible sentence that you face on each of these felony charges 100 years?
>
> MR. HAPPEL: Yes, ma'am.
>
> . . . .
>
> THE COURT: And there is apparently a plea agreement wherein the State will recommend on Count I a 10-year sentence to Montana State Prison with three years suspended, designation as a persistent felony offender, a 2,000 dollar fine and reasonable restitution. And on Count II, the State will recommend 10 years to Montana State Prison, three years suspended, designation as a persistent felony offender, 2,000 dollar fine to run concurrent with Count I --
>
> MR. HAPPEL: Right.

THE COURT: -- and you could argue for a boot camp recommendation from the Court. Is that your understanding of the plea agreement in this matter?

MR. HAPPEL: Yes, ma'am.

THE COURT: And do you understand that that agreement is not binding on the Court, and if the Court were to sentence you more severely, that would not be grounds to withdraw your guilty pleas?

MR. HAPPEL: Yes, ma'am.

. . . .

THE COURT: Are you satisfied with the services and advice of [defense counsel] in this matter?

MR. HAPPEL: Yes.

THE COURT: You feel you've had adequate time to prepare a defense to the charges?

MR. HAPPEL: Yes, ma'am.

THE COURT: The Court will accept your pleas as being knowingly and voluntarily made . . . .

(App. B at 3-7.)

2. Motion to Substitute Counsel and Withdraw Guilty Plea

On April 25, 2009, about two months after the guilty pleas were entered as described above, and just two weeks before a scheduled sentencing hearing, Happel prepared a *pro se* motion to withdraw his guilty plea and appoint new counsel for him. (App. C.) The motion to withdraw his guilty plea was based on

defense counsel's alleged failure to inform Happel of two basic pieces of information: first, that the sentencing agreement was not binding on the court (App. C at 2); and second, that under the plea agreement he would be sentenced as a persistent felony offender, with a possible sentence of up to 100 years. (App. C at 3.) Happel alleged that these actions violated Rules 1.1 and 1.4 of the Montana Rules of Professional Conduct. (App. C at 3-4.) The motion for substitution of counsel was presumably based on the same allegations, as no new ones were included in that portion of the motion. (App. C at 4-5.)

Happel sent his *pro se* motion to the county attorney's office, which forwarded it to defense counsel. (App. D at 2.) The district court did not receive the motion or know anything about it until the scheduled sentencing hearing on May 11, 2009. (Appellant's App. 1 at 4-5.) At that hearing, defense counsel brought the motion to the district court's attention, and the prosecutor opposed it, noting that Happel's allegation that he was not aware of the potential consequences of his guilty pleas was "completely contrary to the entire record as well as specifically his written acknowledgment and waiver of rights, which specifically lays out that he is being sentenced as a persistent felony offender and gives the proper penalties." (Appellant's App. 1 at 2.)

The district court then turned to defense counsel for a response, and she said:

> Well, Your Honor, I'm not really sure what to say. This is not a Finley hearing as far as I can tell, so I don't think I can respond to

> Mr. Happel's allegations. . . . I guess if we're proceeding with these allegations, I guess we should go to a Finley hearing so that Mr. Happel can tell the Court what he thinks his counsel did ineffectively.

(Appellant's App. 1 at 3-4.)

The district court judge, who had just then seen Happel's *pro se* motion for the first time, responded:

> So I guess what I'm going to do is I'm going to continue the sentencing, but I will review the motion, and then I will determine if we need a hearing, and if we do, when. Because I think I have the authority to determine if it meets the initial criteria for the motion. So we'll continue the hearing and we'll see what the next stage is.

(Appellant's App. 1 at 5.) At the State's request, the judge set the next sentencing date for May 22. (Id.)

The State followed up after this hearing by filing a formal "Point Brief on Defendant's Complaint and/or Improper Motion to Withdraw Guilty Plea." (App. D.) The brief reiterated in greater detail the point that the prosecutor had made at the hearing--that the record itself refuted Happel's claims that he was unaware of the consequences of his guilty plea, or that his attorney had been ineffective in any way.

At the May 22 sentencing hearing, defense counsel immediately reminded the judge that he had not yet ruled on Happel's *pro se* motions. (Appellant's App. 2 at 2.) The judge responded:

> Well, that was my error in not notifying people of my response. So I am denying Mr. Happel's motions for at least a couple of reasons, and

> one is he is represented by counsel. But if--as well as, I agree with the State's argument as well that there are no seemingly substantial complaints made in the pro se petition that would trigger the need for a hearing. I don't believe he's raised the threshold matters, so the motion is denied.

(Appellant's App. 2 at 2.) The sentencing hearing was once again continued until June 22, 2009. (Appellant's App. 2 at 3.)

3. Sentencing

The court sentenced Happel in accordance with the joint recommendation under the plea agreement, and also granted Happel's request for a recommendation for placement in boot camp. (Appellant's App. 3 at 1-2.)

B. Applicable Law

State v. Enright, 233 Mont. 225, 229, 758 P.2d 779, 782 (1988), established the general rule at issue in this case: "Upon a showing of a seemingly substantial complaint about counsel, the District Court should conduct a hearing to determine the validity of the defendant's claims." In Enright, the complaints about defense counsel had been seemingly substantial, but the district court had not held a hearing. Rather, the district court had summarily granted Enright's request to remove her court-appointed attorney, and required Enright to proceed to trial *pro se*. This Court reversed and remanded with instructions to appoint substitute counsel for a new trial. Id.

Subsequent decisions have expanded upon the seemingly simple rule established in Enright. In State v. Finley, 276 Mont. 126, 915 P.2d 208 (1996), the Court considered a situation in which a defendant had not asked for removal of his counsel, but had filed a *pro se* motion for change of venue in which he complained about the assistance of his counsel. The Court held that the district court erred in failing to make any initial determination as to whether the complaints about counsel were "seemingly substantial."[2] Finley, 276 Mont. at 143, 915 P.2d at 219; but see State v. Racz, 2007 MT 244, ¶ 20, 339 Mont. 218, 168 P.3d 685 (a letter to the court raising complaints about effectiveness of counsel but not requesting substitution of counsel "fail[s] to implicate the 'seemingly substantial' analysis and the need for a subsequent hearing").

In reaching its conclusion, the Finley Court stated: "In determining if defendant presented a seemingly substantial complaint about counsel, it follows that the district court must make an adequate inquiry into the defendant's complaints." 276 Mont. at 143, 915 P.2d at 219. The Court continued: "In determining whether Finley presented seemingly substantial complaints about the

[2] The Court also held that the error was harmless because a posttrial hearing on effectiveness of counsel had been held. State v. Finley, 276 Mont. 126, 143, 915 P.2d 208, 219 (1996). The case was remanded for a new hearing, however, because the trial court had not appointed separate counsel to represent Finley when his attorney took the stand in opposition to his client and to rebut the allegations of ineffectiveness. 276 Mont. at 146, 915 P.2d at 220-21.

effectiveness of his counsel, the District Court should have inquired into the complaints and made some sort of a critical analysis at the time the motion [for change of venue] was filed." Id.

Shortly after deciding Finley, this Court reversed a case in which a district court had failed to rule directly on the defendant's *pro se* motions to withdraw a guilty plea and to remove defense counsel prior to sentencing. The district court had stated only: "The Court has reviewed most of the motions that have been filed in these matters, and I don't see where they will have anything to do with the sentencing in this matter, Mr. Weaver." State v. Weaver, 276 Mont. 505, 508, 917 P.2d 437, 439 (1996). Among the allegations the defendant had made in his *pro se* motions were that his attorney had deceived him by withholding information and had failed to prepare the case for trial. 276 Mont. at 510, 917 P.2d at 440-41. This Court stated: "We agree with Weaver that the threshold issue is not whether counsel was ineffective, but whether the District Court erred in failing to make an adequate inquiry into his claim of ineffective assistance of counsel." 276 Mont. at 511, 917 P.2d at 441. This Court found that no inquiry had been made, and remanded "to the District Court so that it can make an adequate inquiry into Weaver's allegations and determine whether he has presented seemingly substantial complaints." 276 Mont. at 512, 917 P.2d at 441-42.

The following year, in City of Billings v. Smith, 281 Mont. 133, 135, 932 P.2d 1058, 1059 (1997), this Court was faced with a situation where the defendant had asked for a continuance during trial so that he could get a different attorney, stating that he did not feel his court-appointed attorney was prepared or was representing his best interests. The district court had denied the request for a continuance after counsel explained that he was prepared, although there might have been a difference of opinion between defendant and counsel as to how to handle the case. The district court told the defendant that he could either continue with the current attorney or proceed *pro se*. 281 Mont. at 139-40, 932 P.2d at 1062.

This Court reversed and remanded the case to the district court "so that it can make an adequate inquiry into Smith's allegations and determine whether he had substantial complaints." City of Billings v. Smith, 281 Mont. at 141, 932 P.2d at 1063. Specifically, the Court faulted the district court for not allowing the defendant to express his specific complaints or inquiring into the defendant's factual complaints regarding counsel's lack of knowledge of the case. 281 Mont. at 140, 932 P.2d at 1062-63. Citing cases in which an initial inquiry had been deemed adequate, the Court noted that in such cases "the district court considered the defendant's factual complaints together with counsel's specific explanations addressing the complaints." City of Billings v. Smith, 281 Mont. at 136-37,

932 P.2d at 1060 (citing State v. Craig, 274 Mont. 140, 906 P.2d 683 (1995) and State v. Morrison, 257 Mont. 282, 848 P.2d 514 (1993)).

Subsequent cases have reconfirmed a two-step process to consider a defendant's *pro se* ineffective assistance of counsel complaint at the trial level--an "initial inquiry" to determine whether the complaints are "seemingly substantial," followed, if necessary, by a "hearing," at which the defendant is entitled to different counsel, to determine whether the original defense counsel has been ineffective. See, e.g., State v. Rose, 2009 MT 4, ¶¶ 96, 102, 348 Mont. 291, 202 P.3d 749 (no abuse of discretion found in failing to hold a "hearing" where the "initial inquiry" revealed no seemingly substantial complaints); Halley v. State, 2008 MT 193, ¶¶ 16-17, 24, 344 Mont. 37, 186 P.3d 859 (abuse of discretion found where district court issued an order relieving appointed counsel of her duties and permitting defendant to proceed *pro se* without making an "initial inquiry" into defendant's pretrial claim that counsel would not communicate with him); State v. Hendershot, 2007 MT 49, ¶¶ 23, 30, 336 Mont. 164, 153 P.3d 619 (district court followed the proper procedure but abused its discretion in denying defendant's request for substitution of counsel); State v. Gallagher, 1998 MT 70, ¶¶ 14-15, 26, 288 Mont. 180, 955 P.2d 1371 (Gallagher I) (district court made an adequate "initial inquiry" but erred in finding that the defendant's complaints were not "seemingly substantial").

C. Discussion

In the case at hand, Happel has interpreted these cases as creating "an affirmative obligation" for the district court to conduct a limited hearing as part of the "initial inquiry" step of the process, during which the defendant and counsel are each asked to explain their positions. See Appellant's Br. at 8. Happel asserts that "[i]t may be a very short inquiry, but a district court may not summarily deny the request [for new counsel]." Id.

This interpretation is not dictated by the precedent cited above and, if adopted, would present practical problems in implementation. All of the cases cited above are distinguishable because they were decided when this Court was under the misapprehension that the right to counsel encompassed the right to a "meaningful client-attorney relationship." State v. Enright, 233 Mont. 225, 229, 758 P.2d 779, 782 (1988); State v. Finley, 276 Mont. 126, 142, 915 P.2d 208, 218 (1996); Wilson v. State, 1999 MT 271, ¶ 19, 296 Mont. 465, 989 P.2d 813. As this Court noted both before and after this line of precedent, the right is to "meaningful representation" by an attorney, not a "meaningful relationship." State v. Long, 206 Mont. 40, 46, 669 P.2d 1068, 1071-72 (1983); State v. Gallagher, 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817 (Gallagher II).

An inquiry into whether a "relationship" has been "meaningful" is a very different thing from an inquiry into whether *representation* has been

"meaningful"--that is, effective under the standards of Strickland v. Washington, 466 U.S. 668 (1984) or, in the case of a guilty plea, Hill v. Lockhart, 474 U.S. 52 (1985). While an inquiry into the meaningfulness of a relationship might require some personal questioning of both parties to the relationship, it is clear that a Strickland or Hill assessment can often be made on the basis of a trial court record. See, e.g., State v. Cobell, 2004 MT 46, ¶¶ 16-17, 320 Mont. 122, 86 P.3d 20 (finding no error in dismissal of a postconviction petition without an evidentiary hearing where petitioner alleged that defense counsel had rendered ineffective assistance by failing to properly advise him of the consequences prior to entering a guilty plea); State v. Racz, 2007 MT 244, ¶ 32, 339 Mont. 218, 168 P.3d 685 (rejecting an ineffective assistance of counsel claim on direct appeal based on the trial court record and the law).

To the extent that Finley, Weaver, or City of Billings v. Smith could be interpreted as requiring a trial court to hold an "initial inquiry" (in effect, a limited hearing) whenever a defendant raises allegations about the effective assistance of his or her counsel, they should be limited or overruled. Where, as here, the allegations have been clearly specified in a written motion, and the record just as clearly refutes those allegations, requiring a formal "inquiry" would elevate form over substance. Adopting such a hard-and-fast rule would allow defendants to disrupt or delay proceedings at any time simply by crying "ineffective assistance of

counsel." As this Court has noted: "[C]ourts must be wary against the 'right to counsel' being used as a ploy to gain time or effect delay." State v. Craig, 274 Mont. 140, 153, 906 P.2d 683, 691 (1995) (citing United States v. Kelm, 827 F.2d 1319, 1322 (9th Cir. 1987), overruled in part on other grounds by United States v. Heredia, 483 F.3d 913, 920 (9th Cir. 2007), and citing United States v. Lustig, 555 F.2d 737, 744 (9th Cir. 1977)).

The cases indicating that a limited hearing must be held are also distinguishable on the basis of the complaints made. In Finley, the complaints were made pretrial in the form of a *pro se* motion for change of venue. 276 Mont. at 142, 915 P.2d at 218. Although no details were given, the gist of the complaint was counsel's inadequate preparation for trial. In Weaver, although the complaints, as in the instant case, were made in connection with a *pro se* motion to withdraw a guilty plea, they did not specify exact allegations about counsel's conduct, stating only that the defendant was "decieved [sic]" by counsel's withholding of "vitil [sic] information" that would have affected his decision to plead guilty. 276 Mont. at 510, 917 P.2d at 440-41. Finally, in City of Billings v. Smith, the complaints, made in the form of a *pro se* motion for a continuance at the beginning of trial, were that counsel "was not familiar with the case," and therefore was unprepared for trial. 281 Mont. at 139-40, 932 P.2d at 1062. In each of these cases, unlike in Happel's, the initial allegations of counsel's ineffectiveness were

so vague that no adequate determination could be made whether they were "seemingly substantial" unless further inquiry was made.

Happel's case is also distinguishable from many substitution-of-counsel cases by virtue of the fact that there was no allegation of a "total lack of communication" between Happel and his counsel. See, e.g., Hendershot, ¶ 24; State v. Molder, 2007 MT 41,¶ 33, 336 Mont. 91, 152 P.3d 722; Gazda, ¶ 5; Weaver, ¶ 18; Gallagher II, ¶ 9; Wilson v. State, 1999 MT 271, ¶ 19, 296 Mont. 465, 989 P.2d 813; Gallagher I, ¶¶ 23-25; Finley, 276 Mont. at 142-44, 915 P.2d at 218; Craig, 274 Mont. at 150, 906 P.2d at 689; State v. Martz, 233 Mont. 136, 139-40, 760 P.2d 65, 67 (1988); Morrison, 257 Mont. at 285, 848 P.2d at 516; Long, 206 Mont. at 46-47, 669 P.2d at 1072. In Happel's case, at the first court discussion concerning his allegations, counsel indicated that she had met with him just the week before and discussed them. (Appellant's App. 1 at 3.)

In Happel's case, the allegations were quite specific and were clearly refuted by Happel's own Acknowledgment and the colloquy at the change of plea hearing. No further inquiry was required in order to determine whether Happel's complaints were "seemingly substantial" because of the nature of the complaints made.

To require a trial court to always question both defendant and counsel whenever complaints are expressed also raises unnecessary confusion about the line between an "initial inquiry" and a "hearing." In State v. Gazda, 2003 MT 350,

¶¶ 28, 33, 318 Mont. 516, 82 P.3d 20, this Court held that a defendant is not entitled to the appointment of different counsel during an "initial inquiry," but is entitled to the appointment of different counsel during a "hearing" once a determination has been made that the complaint is "seemingly substantial."

The response of Happel's attorney to the district court's effort to inquire about Happel's complaints illustrates confusion about the difference between an "initial inquiry" and a "hearing." When the judge turned to her for comment on Happel's complaints, as permitted by City of Billings v. Smith and its progeny, she stated: "This is not a Finley hearing as far as I can tell, so I don't think I can respond to Mr. Happel's allegations." (Appellant's App. 1 at 3.) And in at least one case where a district court has held a thorough "initial inquiry," this Court has deemed it to be a "hearing," and remanded for a new hearing because different counsel had not been appointed. State v. Glick, 2009 MT 44, ¶ 15, 349 Mont. 277, 203 P.3d 796; see also Gazda, ¶ 35 (Gray, C.J., specially concurring) ("It appears to me that we have diverging lines of authority on matters relating to the appropriate scope of a trial court's inquiry into a defendant's motion to remove appointed counsel.") Given this occasional confusion between an "initial inquiry" and a "hearing," a district court should not be faulted for making the "seemingly substantial" determination based on the record when possible.

Adopting the Ninth Circuit's approach toward the initial inquiry would eliminate some of the confusion. The Ninth Circuit has ruled that an inquiry into a defendant's *pro se* request for substitution of appointed counsel is adequate if it "give[s] the court 'a sufficient basis for reaching an informed decision.'" United States v. Reyes-Bosque, 596 F.3d 1017, 1034 (9th Cir. 2010) (quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986), overruled on other grounds, United States v. Garrett, 179 F.3d 1143 (9th Cir. 1999)). Thus, in United States v. Smith, 282 F.3d 758, 764-65 (9th Cir. 2002) the Ninth Circuit found no reversible error in a case where "[t]he court conducted no inquiry" into a defendant's posttrial, presentencing motion to substitute counsel. The court explained:

> Recognizing that our busy district courts are in the best position to consider a party's request for substitute counsel, we only require them to generate a "sufficient basis for reaching an informed decision." Conducting a formal inquiry is one way--probably the most common way--of developing a "sufficient basis," but it is not the only way. For instance, "the district court's failure to conduct a formal inquiry is not fatal error," if "[the defendant's] own description of the problem and the judge's own observations provide[] a sufficient basis for reaching an informed decision." United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986).

United States v. Smith, 282 F.3d 758, 765 (9th Cir. 2002) (emphasis added); cf. also Haffey v. State, 2010 MT 97, ¶ 23, ___ Mont. ___, ___ P.3d ___ ("[D]ragging out a facially unmeritorious petition . . . wastes the limited resources of the courts and all parties involved.").

Applying the Ninth Circuit approach to this case, it is apparent that the inquiry was sufficient. The allegations in this case were that Happel had not been informed of specific potential consequences of his guilty plea, allegations that were refuted by the plea agreement and the colloquy in this case. See App. A, B. Under these circumstances, the Defendant's own description of the problem and the record provided a sufficient basis for reaching an informed decision, and no further inquiry was needed. The district court did not abuse its discretion in deciding, based on Happel's allegations and the record, that his complaints about his attorney were not "seemingly substantial." Under the original rule of Enright, because Happel had failed to show a seemingly substantial complaint about his counsel, the district court did not need to conduct a hearing to determine the validity of the defendant's claims.

II. ANY ERROR IN THE PROCEDURE THE DISTRICT COURT FOLLOWED IS HARMLESS, BECAUSE HAPPEL'S GUILTY PLEA WAS VOLUNTARY AND HE RECEIVED THE SENTENCE HE BARGAINED FOR.

The State agrees with Happel that the appropriate remedy, if there were error in the district court's handling of this case, would be a remand in order to conduct an initial inquiry to determine whether Happel's complaints are "seemingly substantial." (Appellant's Br. at 10.) Assuming that were done, there is no reasonable possibility that the complaints would be deemed "seemingly

substantial," as argued above. Therefore, any error in failing to conduct the inquiry is harmless. See State v. Van Kirk, 2001 MT 184, ¶ 42, 306 Mont. 215, 32 P.3d 735 ("reasonable possibility" test).

In addition, even if the district court had appointed new counsel for Happel, he would not have had grounds to withdraw his guilty plea. This Court held in State v. Warclub, 2005 MT 149, ¶ 32, 327 Mont. 352, 114 P.3d 254: "[W]e will not overturn a district court's denial of a motion to withdraw a guilty if the defendant was aware of the direct consequences of such a plea, and if his plea was not induced by threats, misrepresentations, or an improper promise such as a bribe." (citing Brady v. United States, 397 U.S. 742, 755 (1970)). Here, Happel admitted the basic facts of his offenses; the plea agreement and colloquy established that he understood the consequences of his plea and acted voluntarily; and, in the end, Happel received exactly the sentence that he had bargained for.

Even if Happel had failed to understand some of the *possible* consequences of his guilty plea, it is difficult to see how that misunderstanding affected his substantial rights when those consequences did not come to pass. The prosecutor fulfilled his obligations for a sentence recommendation under the plea agreement; the district court adopted the joint plea recommendation, and even granted Happel's request for a recommendation to boot camp; and Happel's sentence was

not increased because of his status as a persistent felony offender.[3] Happel received the benefit of two charges being dropped and one charge being reduced. No promises were "unfulfilled or unfulfillable." See State v. Jones, 2008 MT 331, ¶ 20, 346 Mont. 173, 194 P.3d 86 (quoting State v. Lone Elk, 2005 MT 56, ¶ 21, 326 Mont. 214, 108 P.3d 500).

Montana Code Annotated § 46-20-701(1) provides that "[a] cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial." There being no showing in the record of this case that the failure to hold a limited hearing into Happel's complaints about his counsel was prejudicial to him, this case must be affirmed. See Warclub, ¶ 34 ("Warclub's satisfaction or dissatisfaction with counsel had no bearing upon whether he understood the consequences of his plea, or whether his plea was induced by threats, misrepresentation, or an improper promise." (citing Brady, 397 U.S. at 755)).

[3] The statutes authorize sentences for criminal endangerment or felony theft of ten years and a $50,000 fine. Mont. Code Ann. §§ 45-5-207(2) (criminal endangerment); 45-6-301(8)(b)(i) (felony theft). Happel received ten years with three suspended and a $2,000 fine for each conviction. (Appellant's App. 3 at 1.)

CONCLUSION

The State of Montana respectfully requests that Happel's convictions be affirmed.

Respectfully submitted this 25th day of May, 2010.

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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